Supreme Court, U.S.
FILED
SEP 20 1993
OFFICE OF THE CLERK

No. 93-64

In The Supreme Court of the United States

OCTOBER TERM, 1992

Bano Bi, Individually and on Behalf of the Children of Rashid Kahn, and as Representative of the Estate of Rashid Kahn, et al.,

Petitioners

against,

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., et al, formerly known as Union Carbide Corp.; UNION CARBIDE OF INDIA LTD; UNION CARBIDE EASTERN, INC.; ENSERCH CORPORATION; HUMPHREYS & GLASGOW CONSULTANTS; HUMPHREYS & GLASGOW, LTD; EBASCO-HUMPHREYS & GLASGOW, INC.

Respondents.

ABDUL WAHID, et al.

Petitioners,

against,

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC, formerly known as Union Carbide Corp.; UNION CARBIDE OF INDIA, LTD.,

Respondents.

On Petition For a Writ of Certiorari To The United States Courts of Appeals For The Second Circuit

---

PETITIONERS' REPLY TO BRIEF IN OPPOSITION FILED BY RESPONDENTS

BENTON MUSSLEWHITE
1250 Lyric Centre
440 Louisiana
Houston, Texas 77002
(713) 222-2288
(713) 222-0319 Fax
ATTORNEY FOR PETITIONERS

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

I. Petitioners' Reply To Respondents' Arguments Concerning "Comity and the Act of State Doctrine" 5

II. Reply to Respondents Arguments Concerning Fraudulent Joinder . . . 10

III. In Any Event, The Futility Exception Does Not Apply In This Case . 14

IV. Reply To Respondents' Assertions of Collateral Estoppel 17

CONCLUSION 19

TABLE OF AUTHORITIES

FEDERAL CASES

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 96 S.Ct. 1854 (1976) 8

Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 97 S. Ct. 555 (1977) 14

Bottard v. Hatton Assoc., 680 F.2d 895 (2nd Cir. 1982) 5, 6

Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 108 S. Ct. 1684 (1988) . 19

Crown, Cork & Seal Co., Inc. v. Parker, 462 U. S. 345, 103 S.Ct. 2392 (1983) 20

Dalworth Oil Co. Inc. v. Fina Oil & Chemical Co., 758 F. Supp. 410 (N.D. Tex. 1991) 15

Davis v. Stanley, 650 F.2d 474 (3rd Circ. 1981) 16

Dodd v. Fawcett Publications, Inc., 329 F.2d 82 (10th Cir. 1954) 11

Filartiga v. Pena-Irala, 577 F.Supp. 860 (E.D.N.Y. 1984) 9

Green v. Amerada Hess Corp., 707 F.2d 201 (5th Cir. 1983), cert. denied, 464 U.S. 1039 (1984) 12

Hilton v. Guyot, 159 U.S. 113, 16 S.Ct. 139 (1895) 9

In Re Aircrash Near New Orleans, La. on July 9, 1982, 821 F.2d 1147 (5th Cir. 1987) (en banc), vacated

on other grounds sub non, Pan American World Airways, Inc. v. Lopez, 490 U.S. 1032, reinstated save as to damages under original nom, 883 F.2d 17 (5th Cir. 1989) 19

Intern. Primate Protection League v. Adm'rs of Tulane Educ. Fund, 111 S. Ct. 1700 (1991) 14

Maine Association of Interdependent Neighborhoods v. Commissioner, Maine Department of Human Services, et al, 876 F.2d 1051, 1054 (1st Cir. 1989 16

McCuin v. Texas Power & Light Co., 714 F.2d 1255 (5th Cir. 1983) 5, 6, 16

Moor v. Atchison, Topeka & Santa Fe, 699 F.2d 507 (10th Cir. 1983) 15

Nelson v. Saudi Arabia, 923 F.2d 1528 (11th Cir. 1991) 7, 10

Owen of Ga., Inc. v. Shelby County, 648 F.2d 1084 (6th Cir. 1981) 15

Parklane Hosiery Co. v. Sharp, 439 U.S. 322, 99 S.Ct. 645 (1979) 18

Parks v. New York Times Co., 308 F.2d 474 (5th Cir. 1962) cert denied, 376 U.S. 959, 84 S. Ct. 964 11

Parsons v. Chesapeake & Ohio Ry. Co., 375 U.S. 71, 84 S.Ct. 185 (1963) . 19

Randall v. Arabian Amer. Oil Co., 778 F.2d 1146 (5th Cir. 1985) 6

Timberlane Lumber Co. v. Bank of America, N.J. & S.A., 549 F.2d 597 (9th Cir. 1976) 8

W. S. Kirkpatrick & Company, Inc. v. Environmental Tectonics Corp. Intern., 847 F.2d 1052, aff'd, 493 U.S. 400, 110 S. Ct. 701 (1990) 7, 9, 10

Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines, 965 F.2d 1375 (5th Cir. 1992) 7

Williams v. Curtiss-Wright Corp., 694 F.2d 300 (3rd Cir. 1982) 8

Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 53 S. Ct. 431 (1933) 14

Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 42 S. Ct. 35 (1921) 11

STATE CASES

Berger v. Berger, 578 S.W.2d 547 (Tex. App.—Houston [1st Dist.] 1979, no writ) 16

Billy B. Inc. v. Bd. of Trustees, 747 S.W.2d 156 (Tex. App.—Houston [1st Dist.] 1986) 15

Borderlon v. Peck, 661 S.W.2d 907 (Tex. 1983) 20

Burford v. Sun Oil Co., 186 S.W.2d 306 (Tex. Civ. App. 1945, writ ref'd n.r.e.) 20

City of Betts v. Greater Tex-homa Util. Author, 744 S.W.2d 636 (Tex. Civ. App.-Dal. 1987, no writ) 15

Doneghy v. State, 334 S.W.2d 506 (Ct. of App. Amarillo, 1960, writ. ref'd. n.r.e.) 20

Housing Authority v. State, 539 S.W.2d 911 (Tex. App.—Corpus Christi 1976, writ ref'd n.r.e.) 15

Hunt v. Bass, 664 S.W.2d 323 (Tex. 1984) . 15

Rodgers v. RAB Investments, Inc., 816 S.W. 2d 543, 546 (Tex. App.—Dallas 1991, no writ) 15

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

28 U.S.C. § 1447(c) 14

TEX. CIV. PRAC. & REM. CODE § 16.064 20

Tex. Disciplinary R. Prof. Conduct 1.06(a) (1989) reprinted index. Govt. Code Ann., tit.2, sub tit. G app.(Vernon Supp. 1992) (State Bar Rules art. X, § 9) 6

§ 28 U.S.C. 1654 6

OTHER AUTHORITIES

50 Tex. Jur. 3d, Limitations of Action, § 125, p. 561 20

50 Tex. Jur.3d, Limitations of Action § 50, pp. 607-608 20

C. Wright, A. Miller & E. Miller, Federal Practice & Procedure, §3723, pp. 342, 343 11

Cardozo, International Law in the New York Courts - 1953, 40 Cornell L.Q. 937, 109 (1955) 10

Griffin v. Big Spring Ind., 706 F.2d 645 (1st Cir. 1983), cert. denied, 464 U.S. 1008 20

Lipkowski, Will, "Bhopal Indian

City Begins to Heal But Conflicts Remain", C.&E.N. Dec. 2, 1985, pp. 18-32 3

Model Code of Professional Responsibility, Canon 5; DR5-105(A) 6

Re, E., Foreign Confiscations in Anglo-American Law, 170 (1951) 10

Restatement (Second) of Foreign Relations Law, Sect. 41, cmt. d (1965) 8

Singh, N. K. and Devades, David, "The Settlement Drama", India Today, Dec. 15, 1987, pp. 42-46 3

Singh, N. K., "The Bhopal Bonanza", India Today, Sep. 30, 1987, pp. 94-96 3

Singh, N. K., "The New Nightmare", India Today, Dec. 15, 1986, pp. 128-132 3

Singh, Raminder and Kakaria, Amrit, "Unsettling Verdict", India Today, Mar. 15, 1989, pp. 42-46 3

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

PRELIMINARY STATEMENT

The Respondents' "Counterstatement of the Case" is blatantly inaccurate in many respects, as will be pointed out from time to time *infra*, but most disturbing is that it ignores or glosses over with superficial varnish the terrible truth about what has really happened in India since the tragic disaster of December 1984. See pp. 7, 11, 13–18 of Respondents' Brief In Opposition.

The Respondents incredulously state that the "Petitioners' claims were thereafter (after the Indian government, 'UOI', commenced litigation in India on behalf of the Bhopal victims) fully, fairly and finally resolved by the highest court in India," p. 13 Resp. Opp. Br.; shockingly claim that the Petitioners did not dispute "the material facts concerning the Indian proceedings", Id. at p. 14; and then flatly misrepresent the present situation in India: "[d]istributions to claimants have now occurred", implying that the Bhopal victims have somehow finally received real justice at last. Id. at pp. 14–18.

Our general response to these outrageous statements is that the uncontradicted affidavits

in the record, together with the broadly accepted published literature, establish these incontrovertible facts: the Bhopal tragedy is the greatest and most devastating industrial disaster in history; over 500,000 Indian citizens were either killed or injured; this terrible event was caused by the negligence, and probably the gross negligence, of American-based multi-nationals and their foreign subsidiaries (the Union Carbide and Enserch multi-nationals); the great majority of the victims have always vehemently opposed the settlement as being completely inadequate, completely unfair and the result of collusion;[1] the settlement produced by such collusion is in fact grossly inadequate; in fact, it is so bad that the short-lived government of V. P. Singh attempted to "rescind the settlement"; the victims were not given notice of the settlement proceedings, or allowed to participate, were not consulted and were not given the right to opt-out; and, contrary to what

---

[1] Such collusion was spawned out of the undisputed triple conflict-of-interest that existed: UOI owned a substantial interest in a primary defendant, Union Carbide of India Ltd. ('UCIL') and at the same time undertook to be the sole representative of the victims. UCIL also appointed the judges who were the factfinders in all proceedings.

the Respondents have stated, the latest report indicates that only 800 out of over 500,000 claims have in fact been processed. The way the claims are being processed, "it could take up to twenty years to settle all claims". Except as to the 800 processed claims (claimants in those cases have received only a pittance), the only money that has been paid to the victims is RS 200 ($12.00) per month paid by UOI out of public funds (not the settlement funds) to the residents of the thirty-six gas-affected wards of Bhopal as a sort of "interim subsistence"[2].

---

[2] See affidavits of Abdul Jabbar Kahn, A 69-98, particularly A 71, 74-80, 82-85, 86, 87 (the latter cite discusses how over 11,000 death claims and 508,000 injury claims had been filed and that just "adequate health and economic rehabilitation will require in excess of $4 billion" [not counting "soft damages"]) and Kim Laughlin, A 99-138, particularly A 99, 101, 114-123, 125-128, 133-134; and such articles as N. K. Singh and David Devades, "The Settlement Drama", India Today, Dec. 15, 1987, pp. 42-46 (anything less than $3 billion would constitute acceptance of the view that "Indian life and health were less valuable than American life and health"); N. K. Singh, "The New Nightmare", India Today, Dec. 15, 1986, pp. 128-132; N. K. Singh, "The Bhopal Bonanza", India Today, Sep. 30, 1987, pp. 94-96 ("Over half of the money appropriated in 1987 for victim relief was spent on furniture and motor vehicles for health officials"); four publications - Will Lipkowski, "Bhopal Indian City Begins to Heal But Conflicts Remain", C.&E.N. Dec. 2, 1985, pp. 18-32; paper prepared by Armin Rosencranz, Shyam Divan and Anthony Scott, soon to be published by the U. of Pa. press (hereafter "Rosencranz Paper') at pp. 3-20; Raminder Singh and Amrit Kakaria, "Unsettling Verdict", India Today, Mar. 15, 1989, pp. 42-46; N. D. Jayaprakah, "Perilous Litigation, The Leak

The entire situation in India has been nothing less than a shocking judicial debacle. As we stated in the Petition, unless this Court grants certiorari, it now appears that these star-crossed victims of this unprecedented catastrophe will never see real justice.

Disaster Case", Economic and Political Weekly 25, No. 51, Dec. 22, 1990, pp. 2761-66 - discuss how the collusive settlement was orchestrated in the (Indian) Supreme Court's chamber; how "Rajiv Ghandi's government had colluded with Union Carbide to 'break the victims back' making them more amenable to a small settlement", and how "[o]bservers in India and abroad understood that the (Indian) Supreme Court's action was in no sense a genuine order ... The parties agreed to the $470 million far too easily for anyone to believe that the 'order' had not been prearranged"; and Rosencranz Paper, Chapter entitled Legal and Political Repercussions In India, discussing how Prime Minister Singh's attempted "to set the Carbide money aside, undertook to compensate the victims from public monies, and asked the Court to rescind the settlement"; and how the Government of Prime Minister Chandra Shekhar, which succeeded the Singh administration in November 1990, reestablished the old Rajiv Ghandi policies and orchestrated yet another corrupt approval of the grossly inadequate settlement. Despite the October 16, 1992 order of the Supreme Court setting up 40 claims courts to finally start processing claims, after eight months only 800 claims had been processed so that, "at this rate it could take up to 20 years to settle all claims". pp 3-21 of Rosencranz Paper. Indeed the turmoil in India continues to this day; the Times of India reported as recently as August 25, 1993: "More than 1,000 activists belonging to the Bhopal Gas Preedit Mahila Udyog Sanghatan courted arrests yesterday to protest against the procedure adopted for scrutinizing the claims in the second phase of the distribution of the interim relief ... there have been charges of corruption and irregularities in the procedure for the distribution of the declaration forms which have to be submitted by the claimants to get the second phase of interim relief."

I.
Petitioners' Reply To Respondents' Arguments Concerning "Comity and the Act of State Doctrine"

Respondents focus heavily upon the act of state doctrine, see pp. 19-32 of Opp. Br. Our position, however, is that the Court should grant certiorari because the decision of the Court of Appeals directly conflicts with several lines of authority in this important area of the law. The Respondents have failed to address and/or overcome these points:

1) As noted in W.S. Kirtkpatrick v. Environmental Tectonics Corp., 110 S.Ct. 701, 704 (1990), the act of state doctrine has constitutional underpinnings involving the "domestic separation of powers" but Petitioners contend that the force of that constitutional aspect is overwhelmed by the constitutional and statutory right of parties in the federal court to have counsel of their own choice and this means counsel who do not have a conflict of interest. See McCuin v. Texas Power & Light Co., 714 F.2d 1255, 1262 (5th Cir. 1983); Bottard v. Hatton Assoc., 680 F.2d 895, 897, n. 2 (2nd Cir. 1982); and Davis v. Stamler, 650 F.2d 477, 480

(3rd Cir. 1981).[3] We submit that the Court should grant certiorari to resolve the clash between these two sets of constitutional rights.[4]

2) "Exclusivity" provisions enacted by foreign nations simply are not enforced in our courts. In Randall v. Arabian American Oil Company, 778 F.2d 1146 (5th Cir. 1985), Saudi Arabia adopted a law giving the Saudi Arabia Labor Commission the "exclusive jurisdiction" over suits for wrongful discharges occurring in Saudi Arabia. The U.S. district court held that it was bound by such provision under the act of state doctrine and the Court of Appeals reversed.[5]

---

[3] In McCuin the Court stated that and "the right to counsel in civil cases is no less fundamental (than the right to counsel in criminal cases) and springs from both statutory authority and from the constitutional right to due process of law." 714 F.2d at 1262. Bottard based the right to counsel upon 28 U.S.C.§ 1654.

[4] U.O.I., as the representative of the plaintiffs, and U.O.I's chosen counsel, would have to be disqualified in the American courts because they have a conflict of interest. McCuin, 714 F.2d at 1262; TEX. DISCIPLINARY R. PROF. CONDUCT 1.06(a) (1989) *reprinted in* TEX. GOVT. CODE ANN., tit.2, sub tit. G app.(Vernon Supp. 1992) (STATE BAR RULES art. X, § 9).

[5] The Court stated:

"We reject outright the notion that the law of a foreign country can unilaterally curtail the power

3) The "commercial activity" exception to the act of state doctrine was applied in W. S. Kirkpatrick & Company, Inc. v. Environmental Tectonics Corp. Intern., 847 F.2d 1052, 1059, aff'd, 493 U.S. 400, 110 S. Ct. 701 (1990); Nelson v. Saudi Arabia, 923 F.2d 1528, 1531-32 (11th Cir. 1991), and Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines, 965 F.2d 1375, 1387-88 (5th Cir. 1992).[6] There is no doubt that UOI, by owning a substantial interest in the "industry" being operated by UCIL, was engaged in a "commercial activity" and, since the Bhopal Act was passed to facilitate the settlement of the claims arising out of that

---

of our federal courts to hear a dispute even though the dispute involves rights fixed by the laws of another nation... By refusing to enforce the exclusive jurisdiction provision of the Labor Law we are not judging the validity of that provision within the territorial sovereignty of Saudi Arabia in violation of the Act of State Doctrine. We are simply refusing to give that provision effect within our country and our courts."

778 F.2d at 1150. See also, cases cited at pp. 55, 56 of Pet.

[6] In Walter Fuller, the Court noted that if the nature of the transaction is essentially commercial then, even though "public acts lurk in the background", the act of state doctrine does not apply. 965 F.2d at 1388. Moreover, commercial activity was defined in Nelson as engaging "in industrial, commercial, financial or other business enterprise in which private persons may there engage." 923 F.2d at 1532.

activity, the so-called "act" which the Court of Appeals held subject to the act of state doctrine was part and parcel of the commercial/industrial activity of the chemical plant operation in India.

4) In Timberlane Lumber Company v. Bank of America, N.J. & S.A., 549 F.2d 597, 607, 608 (9th Cir. 1976), the Court, citing the Restatement (Second) of Foreign Relations Law, Sect. 41, cmt. d (1965), held that an "act of state" is one that involves the public interests, "as distinct from its interest in providing the means of adjudication of disputes or claims that arise within its territory". Surely, the Bhopal Act was one that dealt with the "means of adjudication of claims that arise within its territory."

5) Finally, Respondents do not dispute that they had the burden of proving that the act of state doctrine applied, see Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695, 96 S.Ct. 1854, 1861-62 (1976) and Williams v. Curtiss-Wright Corp., 694 F.2d 300, 303 n.4 (3rd Cir. 1982); that burden included the obligation, in a case such as this one, to obtain the views of the State Department as to whether

the foreign policy of the United States would, in its opinion, be adversely impacted by not applying the act of state doctrine to the Bhopal Act. The Respondents failed to offer such proof and the Court of Appeals did not require one either. Thus, on the basis of the record before this Court, on that element alone the act of state doctrine does not apply.[7]

It is hard to understand the Court of Appeals' rationale for its decision in connection with the act of state doctrine. The Court admitted that the decision it reached involved "an issue of first impression", A 39, and that "the act of state doctrine is not precisely applicable here." A 42. But, other than mentioning "comity" generally,[8] the Court never clearly identified precisely what rule of law it applied, if any, to reach its result. This

---

[7] As we discussed in the Petition, there are other grounds for holding that the act of state doctrine does not apply, such as those expressed in Kirkpatrick and such as the consensus doctrine, see Filartiga v. Pena-Irala, 577 F.Supp. 860 (E.D. N.Y. 1984) and pp. 52-56 of Pet.

[8] And if "comity" is the basis for the decision, then Petitioners are entitled to collaterally attack the Bhopal Act and the settlement judgment in accordance with Hilton v. Guyot, 159 U.S. 113, 16 S.Ct. 139 (1895) and, as discussed in the Petition, see pp. 57-58, there are several fact issues in that regard, any one of which precluded summary judgment and/or dismissal.

defies the doctrine of stare decisis and further suggests the need for the grant of certiorari.[9]

II.
Reply to Respondents Arguments Concerning Fraudulent Joinder

Respondents argue that "discovery (on the personal jurisdiction and remand motions) was abandoned by petitioners when faced with a motion for a protective order." n. 11, p. 37 of Resp. Opp. Br. That statement is outrageous.

Indeed, Respondents themselves state in their motion for a protective order that Judge Keenan had, before they filed the motion, already stated at the Status Conference on April 8, 1991 that he would not reconsider Judge Fisher's precipitous actions in the Bano Bi case and had ordered that further "discovery would not be in order." A 686, 687. Now how can the Respondents with a straight face contend that Petitioners

---

[9] It also defies the present trend of narrowing the act of state doctrine and its rationale rather than expanding it, as the Court of Appeals now seeks to do. See Kirkpatrick, 110 S.Ct. at 701 and Nelson, 923 F.2d at 1531. The Court in Nelson noted:

> "Neither the doctrine of foreign sovereign immunity nor the act of state doctrine are as widely applied now as in the past. Indeed, it was suggested years ago that the act of state doctrine had 'earned a well-deserved rest.'"

See also, E. Re, Foreign Confiscations in Anglo-American Law, 170 (1951) and Cardozo, International Law in the New York Courts - 1953, 40 Cornell L.Q. 937, 109 (1955).

"waived" a right by failing to exercise it when, as Respondents assert, Petitioners were ordered by the Court not to exercise it?

The most dissembling statements in Respondents' Opp. Br. are those found at pp. 39-40 where they claim to have offered "detailed and competent" proof that the alien defendants had no contacts with Texas; that "there was no possibility that a valid cause of action could be asserted against" the in-state defendants; and that "petitioners wholly failed to set forth any facts to support their allegations that these (alien) defendants were subject to the in personam jurisdiction of the Texas state court".[10]

The "detailed and competent proof" that the

---

[10] "A claim that joinder is fraudulently intended to defeat removal must be asserted with particularity, and supported by clear and convincing evidence." C. Wright, A. Miller & E. Miller, Federal Practice & Procedure, §3723, pp. 342, 343. See also Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 42 S. Ct. 35 (1921), stating that a sham or fraudulent joinder must "be shown by a petition for removal" and such allegations "must consist of a statement of facts rightly leading to that conclusion apart from the pleader's deductions." 42 S. Ct. at 37; emphasis ours. The allegations of "fraudulent joinder may not rest upon 'epithets', but must be such as compels the conclusion that the joinder is without right and made in bad faith." See also, Parks v. New York Times Co., 308 F.2d 474 (5th Cir. 1962), cert. denied, 376, U.S. 959, 84 S. Ct. 964; and Dodd v. Fawcett Publications, Inc., 329 F.2d 82, 85 (10th Cir. 1954).

Respondents claim to have asserted consists of nothing more than "epithets" and conclusory statements that the alien defendants had no contacts with the Texas forum and the in-state defendants had no connection with the tragedy. See removal papers at JA 1825–1835.[11]

With regard to the in-state defendants, Enserch and EH&G, Respondents admit that they are in-state but merely assert that "upon information and belief" they were not "involved in the design, construction or operation of the UCIL pesticide manufacturing and storage plant in Bhopal, India". JA 1831. Contrary to Respondents false claim that Petitioners "have not offered a single fact", Resp. Opp. Br. at 41, Petitioners did offer specific proof which established that Enserch and EB&G were involved with the Bhopal plant. See A-112, 113 (Laughlin affidavit) and JA 414, 415, 431 - 434 (Plaintiffs

---

[11] The Respondents have admitted in their Opposition Brief that the "no possibility" rule applies to their "fraudulent joinder" contentions and thus they had upon them the burden to "prove that there is no possibility that the plaintiff will be able to establish a cause of action against the in-state (or alien) defendant(s) in state court." Resp. Opp. Br. at 33, quoting Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir. 1983), cert. denied, 464 U.S. 1039 (1984).

Rule 3(G) Statement in the District Court).[12]

With regard to the four alien defendants, again the Respondents' assertions were conclusory and, again, the Laughlin affidavit and Petitioners' Rule 3(G) Statement in the District Court thoroughly undercut them.[13]

Despite the fact that Petitioners were erroneously given no opportunity for discovery, the record before the Court still establishes that the Respondents did not satisfy their "no possibility" burden. To the best of our knowledge, it has been many years since the Court has granted certiorari specifically on the fraudulent joinder issue. We respectfully suggest that this case – where so many facets of the subject have been presented – is a propitious one for the Court's intervention, particularly in

---

[12] Rule 3(g) of the Local Rules of the Southern District of New York states that "all material facts set forth in the statement [3(G)] ... will be deemed to be admitted unless controverted by the statement by the opposing party". And, as we noted in our Petition, the Court of Appeals in the first appeal discussed the Humphrey & Glasgow connection. 809 F.2d at 200.

[13] See Laughlin affidavit for a detailed statement of how UCC dominated UCIL and UCE, how UCC actually ran UCIL, particularly with regard to the Bhopal plant, and how UCC might be deemed the agent of UCIL and/or UCE for the purposes of jurisdiction and/or might be the alter ego of each other. A101-112 and see Plaintiffs Rule 3(G) Statement, JA 431, 432.

view of the importance of such principles as federalism, comity and removal/remand law.

III.
In Any Event, The Futility Exception Does Not Apply In This Case

The Respondents claim that there is no conflict with regard to the "futility exception". See pp. 42-46 of Resp. Opp. Br. As we noted in our Petition, we read International Primate Protection League v. Administrators of Tulane Educational Fund, 111 S. Ct. 1700 (1991) ("International Primate") differently and contend that the Court left that question open, with large hints that 28 U.S.C. § 1447(c) might unconditionally require remand where the district court determines there is no standing in the federal court. See Pet. at pp 29-35.

But assuming arguendo such an exception exists, it is clear that it does not apply in this case. In the first place, while the question of standing in the federal court and the application of the act of state doctrine may be one of federal law, most assuredly the question of standing in the state courts is one of state law. Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 53 S. Ct. 431, 435

(1933).[14]

In the second place, it is clear that, under Texas law on standing, the Petitioners probably do have standing to litigate this case in the Texas state court.[15] The Texas rule on standing is defined in Rodgers v. RAB Investments, Inc., 816 S.W. 2d 543, 546 (Tex. App.-Dallas 1991, no writ);[16] and, as there defined, the standing requirements in Texas apparently are not susceptible to any parens patriae type of representation. Instead they focus upon "some interest peculiar to the person individually and not as a member of the general public". Hunt v. Bass, 664 S.W.2d 323, 324 (Tex. 1984). "(O)nly the person whose primary legal

---

[14] See also, Moor v. Atchison, Topeka & Santa Fe, 699 F.2d 507, 511 (10th Cir. 1983); Owen of Ga., Inc. v. Shelby County, 648 F.2d 1084, 1088 (6th Cir. 1981).

[15] Most state courts will be more liberal about standing because the state courts' jurisdiction is not governed by Art. III of the U.S. Constitution. Dalworth Oil Co. Inc. v. Fina Oil & Chemical Co., 758 F. Supp. 410, 411 (N.D. Tex. 1991) (noting that "standing requirements in state court are often less stringent than those in federal court precisely because of Art. III").

[16] See also, City of Betts v. Greater Tex-homa Util. Author, 744 S.W.2d 636, 639 (Tex. Civ. App.-Dal. 1987, no writ); Billy B. Inc. v. Bd of Trustees, 747 S.W.2d 156, 158 (Tex. App.—Houston [1st Dist.] 1986, no writ); and Housing Authority v. State, 539 S.W.2d 911, 913-14 (Tex. App.—Corpus Christi 1976, writ ref'd n.r.e.).

right has been breached may seek redress for an injury". Berger v. Berger, 578 S.W.2d 547, 549 (Tex. App.—Houston [1st Dist.] 1979, no writ) (emphasis ours). And, as we have already pointed out, that person has the constitutional right to a lawyer of his or her own choice, and one who "does not have a conflict of interest". McCuin, 714 F.2d at 1263; see also, Davis, 650 F.2d at 480.[17]

In any event, "the futility doctrine" should, we respectfully submit, be clarified by this Court by way of certiorari.[18]

---

[17] In addition, there is, of course, the "Open Courts Provision" of the Texas Constitution Art I, Sect. 13, which gives further impetus to the view that Texas Courts are more liberal about standing than the federal courts. See p. 32 of Pet. n. 35. One thing is certain: even if a futility exception exists, it does not apply if it is just "conceivable" that the state court would entertain the claim. Maine Association of Interdependent Neighborhoods v. Commissioner, Maine Department of Human Services, et al, 876 F.2d 1051, 1054 (1st Cir. 1989). Because of the broad view of standing in the state courts under Texas law, it is certainly "conceivable" that a Texas court would hold that the Petitioners would have standing in the Texas court.

[18] The Respondents inject inappropriate and wholly irrelevant comments as to whether Petitioner's present counsel has the right to represent the Petitioners. In the first place, the Respondents did not file a motion to show authority in the Court of Appeals, even though they certainly could have done so if they had really believed there was no such authority. Indeed, in their Brief before the Second Circuit they implicitly conceded that counsel did have such authority. See p. 8 of such Brief. In any event, the record in the court below definitely

IV.
Reply To Respondents' Assertions of Collateral Estoppel

At page 2 of Respondents' Brief, they state that "Petitioners have not disputed Union Carbide's contention below that they are the same Plaintiffs who were previously before the District Court." This is another outrageously untrue statement.

To be sure, the Respondents admitted in District Court that they could not, and did not, contend that all of the Bano Bi and Wahid Plaintiffs had been named in the 1985 action. See JA 6746. Even the statements that some of such plaintiffs had been named pales before the unequivocal statements of the Bano Bi Petitioners that "Bano Bi Plaintiffs were not specifically

---

established that, with regard to the Bano Bi plaintiffs, Wayne Walker was employed (A 73 wherein Mr. Khan swears that "(a)s leader of the Bhopal Gas Peedit Mahilo Udyog Sangathan, I work (sic) with the Plaintiffs in Bano Bi to employ Mr. Walker and other American counsel") and that he, in turn, requested that present counsel handle the appeal. JA 6271. As to the Wahid Plaintiffs, it is not disputed that James P. Frantz is the authorized attorney for those plaintiffs and that he, in turn, also requested present counsel to handle the appeal on their behalf. JA 6270. Petitioners counsel will ignore the completely irrelevant references to his suspension made at p. 18, 19 of the Resp. Opp. Br., except to say that he sincerely believes he will be fully vindicated, including with regard to the suspension, in the case of Benton Musslewhite v. State Bar of Texas, No. 92-37727, 270th District Court, Harris County, Texas, which is presently pending.

listed as plaintiffs in the earlier (1985) action in this Court, or, if listed, such li ting was made without the knowledge and conse..t of the Bano Bi Plaintiffs". JA 364; A 72-74 (Kahn affidavit); A 123-125, 129 (Laughlin affidavit).

In any event, even if the Plaintiffs in this suit had been named in the first suit, the 1986 forum non conveniens dismissal by Judge Keenan was of course without prejudice and, as we noted in our Petition, the 1986 dismissal cannot collaterally estop the Petitioners with regard to issues not expressly decided or where the circumstances are different. Parklane Hosiery Co. v. Sharp, 439 U.S. 322, 99 S.Ct. 645 (1979). Thus, there can be no collateral estoppel with regard to the following: 1) the question of whether this case should be dismissed under the state of Texas forum non conveniens law (and its Open Forum Statute); 2) whether, at present, India is not an adequate alternative forum; and 3) whether the stipulations of the Petitioners in this case, the ceasing of operations of the plant in India and the other circumstances as they exist at this time, suggest that the American forum is not an inconvenient forum for the trial

of this case.[19]

CONCLUSION

Space limitations preclude us from addressing all of the insupportable statements made, and positions taken, by the Respondents. Though completely irrelevant to the issues in this Petition, we cannot refrain, however, from mentioning one of Respondents most frivolous contentions of all – that the Petitioners claims might be barred by limitations. In Petitioners Brief filed in the District Court, the myth of such a defense was fully obliterated. JA 110-131 and supporting affidavits of Khan, A 88 to 95,

---

[19] See pp. A 113 - 128 of the Laughlin Affidavit and A 74 - 88, 95, 96 of Khan Affidavit and the account of the utter turmoil in India in the publications discussed under I, supra. See also, In Re Aircrash Near New Orleans, La. on July 9, 1982, 821 F.2d 1147, 1166 (5th Cir. 1987) (en banc), vacated on other grounds sub nom, Pan American World Airways, Inc. v. Lopez, 490 U.S. 1032, reinst. save as to dams under original nom, 883 F.2d 17 (5th Cir. 1989) (the circumstances at time of filing control the forum non conveniens determination); Chick Kam Choo, 486 U.S. 140, 148-49, 108 S. Ct. 1684, 1690-91 (holding that where, in a prior forum non conveniens decision of the federal court, the court did not address the question of dismissal under state forum non conveniens law, collateral estoppel or issue preclusion does not apply in a suit subsequently filed in state court); Parsons v. Chesapeake & Ohio Ry. Co., 375, U.S. 71, 84 S.Ct. 185 (1963) (holding that the forum non conveniens determination of the state court did not collaterally estop same suit subsequently filed in federal court).

and Laughlin, A 129 to 132.[20]

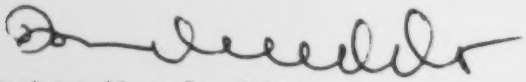
After all is said and done, what shines through the cloudy rhetoric of the Respondents' Opp. Br. most of all is the bright line of abuse of federal power by the courts below. Simply put, this case belongs in the state court of Texas. Considerations of federalism, comity and removal/remand law make the "fraudulent joinder" issues the most important ground for the grant of certiorari.

Petitioners pray the Court to grant such writ.

---

[20] For example the 1988 Bhopal Act and the orders of the Indian Supreme Court staying proceedings tolled the statute of limitations. 50 Tex. Jur. 3d, Limitations of Action, § 125, p. 561; Doneghy v. State, 334 S.W.2d 506, 509 (Ct. of App. Amarillo, 1960, writ ref'd n.r.e.). Succeeding class actions have constituted a concatenate tolling of limitations. See Crown, Cork & Seal Co., Inc. v. Parker, 103 S.Ct. 2392 (1983). The actions of Respondents, in concert with UOI, create at least a fact issue under the Texas law as to equitable estoppel. Borderlon v. Peck, 661 S.W.2d 907 (Tex. 1983). Limitations was also tolled under the Texas "wrong-court" statute, TEX. CIV. PRAC. & REM. CODE § 16.064. See Griffin v. Big Spring Ind., 706 F.2d 645 (1st Cir. 1983), cert. denied, 464 U.S. 1008; Burford v. Sun Oil Co., 186 S.W.2d 306 (Tex. Civ. App. 1945, writ ref'd n.r.e.); and 50 Tex. Jur.3d, Limitations of Action § 50, pp. 607-608. And since many of the named Plaintiffs were minors, limitations as to their causes of action do not run until they are twenty years old. TEX. CIV. PRACT. & REM. CODE § 16.002.

Respectfully submitted,



Benton Musslewhite
TBA #14752000
1250 Lyric Centre
440 Louisiana
Houston, Texas 77002

ATTORNEY FOR PETITIONERS
BANO BI, et al
ABDUL WAHID, et al